

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

KWAJI MILLER,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH
SERVICES,

Respondent.

) Case No. DEMO-03-0035

)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, BUSSE NUTLEY, Vice Chair, and GERALD L. MORGEN, Member. The hearing was held at Washington State Patrol, Large Conference Room, 2715 Rudkin Road, Union Gap, Washington, on December 15 and 16, 2004.

1.2 **Appearances.** Appellant Kwaji Miller was present and was represented by Jacqueline Shea, Attorney at Law. Patricia Thompson, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of a demotion for neglect of duty, gross misconduct and willful violation of agency policy. Respondent alleges that Appellant gave a sworn statement regarding the disciplinary action of a subordinate employee that undermined the department's position in that action, contained half-truths and innuendo and which was potentially damaging to other staff.

II. FINDINGS OF FACT

2.1 Appellant Kwaji Miller is a permanent employee for Respondent Department of Social Health Services (DSHS). Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on November 26, 2003.

2.2 Appellant began her employment with DSHS in December 1993, and has worked in the social services field for over 30 years. Appellant has no prior history of formal or informal disciplinary action. In August 2003, Appellant was a Social Worker (SW) 4 and was responsible for supervising the Child Welfare Services Unit.

2.3 In her capacity as an SW 4, Appellant supervised SW 2 Megan Lozano beginning in approximately January 2003 when Ms. Lozano transferred into the Child Welfare Services Unit. In May 2003, Ms. Miller initiated a Conduct Investigation Report against Ms. Lozano alleging Ms. Lozano engaged in unprofessional conduct with a client. Appellant also conducted an interview with Ms. Lozano and with the client who made the allegations against Ms. Lozano. Appellant wrote a summary of her interview with the client, which was forwarded to the appointing authority, Ken Nichols, Regional Administrator for Region 2 Division of Children and Family Services.

2.4 On June 11, 2003, Mr. Nichols made a finding of misconduct against Ms. Lozano. Mr. Nichols subsequently terminated Ms. Lozano effective July 24, 2003. Appellant was not involved in any discussion with Mr. Nichols regarding what allegations he levied against Ms. Lozano or what level of discipline to impose.

1 2.5 After Appellant delivered the termination letter to Ms. Lozano, she spoke briefly with Mr.
2 Nichols and indicated that she wished that “something else had happened” and that she “hoped” the
3 issues with Ms. Lozano could have been mediated. Appellant knew that the decision to terminate
4 Ms. Lozano was entirely within the purview of Mr. Nichols. Appellant also knew that Mr. Nichols
5 considered information in addition to Appellant’s investigation, though she was not privy to the
6 content of such other information, when he made his determination to terminate Ms. Lozano.
7 Appellant told Mr. Nichols she respected his decision to terminate Ms. Lozano.

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9 2.6 After the department terminated Ms. Lozano, her attorney, Wiley Hurst, contacted Appellant
10 regarding the events that led to Ms. Lozano’s termination. Based on the information Appellant
11 provided, Mr. Hurst asked her for a written sworn statement. Appellant indicated she would have to
12 first get approval from her supervisor, Greg Dootson, and Mr. Nichols.

13
14 2.7 Appellant notified Mr. Dootson and Mr. Nichols that she had been contacted by counsel for
15 Ms. Lozano, who asked her to provide an affidavit in Ms. Lozano’s matter, if not voluntarily, then
16 under subpoena power. Mr. Nichols told Appellant to “tell the truth.” He did not provide
17 Appellant with any specific instructions regarding how to proceed in the matter; however, he was
18 under the impression that Appellant would follow the agency’s practice to wait until subpoenaed
19 and give a statement only with an attorney for the department present.

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21 2.8 On August 10, 2003, Appellant signed a nine-page sworn statement she prepared giving her
22 opinion regarding the events leading to Ms. Lozano’s termination. Appellant’s statement, in part,
23 contains language that she disagrees with Mr. Nichols’ decision to terminate Ms. Lozano because
24 there were no grounds for dismissal. Appellant prepared and signed the statement during off-duty
25 hours.

1 2.9 On August 12, 2003, Ken Nichols received a packet of information from Mr. Hurst asking
2 Mr. Nichols to reconsider his decision to terminate Ms. Lozano. While reviewing the information,
3 Mr. Nichols discovered the written sworn statement signed by Ms. Miller. After reading
4 Appellant's sworn statement, Mr. Nichols was troubled by its contents, which he believed portrayed
5 an inaccurate account of the events leading to Ms. Lozano's termination. Mr. Nichols believed
6 Appellant's statement contained untruths and undermined management's actions in the Lozano
7 case, alleged that Mr. Dootson had engaged in discrimination against Ms. Lozano, and that
8 Appellant's former supervisor, Debbie Bond, had been aware of and approved of actions by Ms.
9 Lozano which were a part of the decision to terminate Ms. Lozano. Mr. Nichols was also disturbed
10 that Appellant had neither waited to be subpoenaed nor obtained advice from the agency's Assistant
11 Attorney General before providing the sworn statement. Mr. Nichols contacted Mr. Dootson, who
12 confirmed Appellant had not notified him that she had given the statement.

13
14 2.10 Mr. Nichols directed John Olivas, Area Administrator, to conduct a fact-finding
15 investigation. In a written response to Mr. Olivas, Appellant's counsel responded to the charges. In
16 summary, it was Appellant's position that she gave the sworn statement because both Mr. Nichols
17 and Mr. Dootson had authorized her to do so; she denied the statement contained untruths and false
18 allegations; she denied her statement implied that Mr. Dootson had discriminated against Ms.
19 Lozano; she asserted that the statements regarding Debbie Bond were that Ms. Bond was aware of
20 Ms. Lozano's caseload decisions, not that Ms. Bond approved of the decisions; and she asserted the
21 statement was accurate to the best of her knowledge and given in good faith.

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23 2.11 On September 15, 2003, Mr. Olivas completed a written report of his investigative results,
24 which he provided to Mr. Nichols. After reviewing the report, Ms. Nichols determined that
25 Appellant engaged in misconduct. He concluded Appellant did not know all the factors that led to
26 Ms. Lozano's termination, and that her written statement contradicted his determination in Ms.

1 Lozano's matter. Mr. Nichols found that by giving the written statement, Appellant acted outside
2 the scope of her management duties and undermined his decision to terminate Ms. Lozano.

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4 2.12 In determining the level of discipline, Mr. Nichols considered Appellant's length of service
5 and her employment record. Mr. Nichols believed Appellant's behavior was unacceptable and that
6 he could no longer trust her judgment. Therefore, Mr. Nichols decided that demoting Appellant to a
7 non-supervisory SW 3 position was the appropriate sanction. By letter dated October 13, 2003, Mr.
8 Nichols notified Appellant that she was demoted from her Social Worker 4 position to a Social
9 Worker 3 position, effective October 29, 2003. Mr. Nichols charged Appellant with neglect of
10 duty, gross misconduct and willful violation of agency policy 6.04, Standards of Ethical Conduct
11 for Employees.

12 13 **III. ARGUMENTS OF THE PARTIES**

14 3.1 Respondent asserts the sworn statement signed by Appellant was in support of the Lozano
15 matter and contrary to the action Mr. Nichols took. Respondent contends Mr. Nichols was unaware
16 Appellant made the statement, which failed to show support for management and the actions the
17 appointing authority had taken. Respondent argues the appointing authority disciplined Appellant
18 for taking actions outside the scope of her authority and for giving a sworn statement that was
19 misleading, contained half truths, innuendo and was potentially damaging to other staff.
20 Respondent asserts a demotion from Social Worker 4 to Social Worker 3 was the appropriate
21 sanction.

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23 3.2 Appellant argues that the decision to demote her is not supported by the facts and she asks
24 that her appeal be granted. Appellant asserts she obtained permission to make a written statement
25 in lieu of being subpoenaed. Appellant contends that she has a good employment record and a long
26 history with the department.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.

4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987).

4.4 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989). Flagrant misbehavior occurs when an employee evinces willful or wanton disregard of his/her employer's interest or standards of expected behavior. Harper v. WSU, PAB No. RULE-00-0040 (2002).

4.5 Willful violation of published employing agency or institution or Personnel Resources Board rules or regulations is established by facts showing the existence and publication of the rules or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

4.6 As an SW 4 in a management position, and as the investigator in the case, she was held to a high level of judgment and accountability. As a participant in the investigation into allegations

1 against Ms. Lozano, Appellant had been given information that she would not have been privy to
2 but for her role in the investigative process. Appellant was an experienced social worker who was
3 often subpoenaed by opposing counsel and understood the sensitivities of litigation and department
4 practices about communicating with opposing counsel. It would have been reasonable and prudent
5 for her to assume that Ms. Lozano's attorney wanted a statement from her in an attempt to obtain
6 confidential information that was not a part of her report. Therefore, she had a duty to exercise
7 caution when she provided a statement she clearly understood would be used in litigation against
8 the department.

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10 4.7 By deliberately preparing a written statement knowing she did not have full knowledge of
11 all relevant facts in the Lozano matter, Appellant provided information to Mr. Hurst that was
12 inaccurate and incomplete and did not correctly reflect all information known to Mr. Nichols when
13 he terminated Ms. Lozano. By failing to notify her superiors prior to providing the statement to Mr.
14 Hurst or having an attorney for the department review the statement, Appellant placed the
15 department at risk of liability resulting from any subsequent court action. Respondent has met its
16 burden of proving that Appellant's actions constitute a neglect of her duty, a violation of the
17 agency's ethics policy and rises to the level of gross misconduct. However, Respondent has failed
18 to prove Appellant acted outside the scope of her position when she gave a written statement during
19 her off-duty time.

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21 4.8 In determining whether a sanction imposed is appropriate, consideration must be given to
22 the facts and circumstances, including the seriousness and circumstances of the offenses. The
23 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to
24 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the
25 program. An action does not necessarily fail if one cause is not sustained unless the entire action
26 depends on the unproven charge. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

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2 4.9 Appellant was in a highly professional position and was entrusted by the department to
3 exercise good judgment and discretion in all her actions. As such, she must be held to a higher
4 standard of conduct and accountability. Respondent has proven that under the undisputed facts and
5 circumstances of this case, demotion is the appropriate sanction and the appeal should be denied.
6

7 **V. ORDER**

8 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Kwaji Miller is denied.
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10 DATED this _____ day of _____, 2005.
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12 WASHINGTON STATE PERSONNEL APPEALS BOARD
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14 _____
15 Busse Nutley, Vice Chair
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17 _____
18 Gerald L. Morgen, Member
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